

STATE OF MICHIGAN
COURT OF APPEALS

DAVID T. FRANKLING and LINDA M.
FRANKLING,

UNPUBLISHED
July 15, 2008

Petitioners-Appellees,

v

CHARTER TOWNSHIP OF VAN BUREN,

No. 271228
Wayne Circuit Court
LC No. 05-534884-AV

Respondent-Appellant.

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Respondent, Charter Township of Van Buren, appeals by leave granted the order of the circuit court reversing a decision of respondent's board of zoning appeals ("the BZA") to allow petitioners' neighbors to proceed with the construction of a large attached garage. On appeal, respondent argues that the circuit court erred in failing to join the owner of the subject property as a necessary party, by reversing the BZA's decision, and by holding that respondent waived its standing argument by failing to raise it before the BZA. We affirm.

The dispute underlying this lawsuit stems from the opposition of petitioners, David Frankling and Linda Frankling, to the plans of their former neighbors, the Cohens, to construct a large attached garage. The Cohens have since sold the property to buyers with knowledge of this dispute. Beginning in mid-2004, petitioners filed several ordinance complaint forms with respondent, arguing that the planned garage violated several provisions of respondent's zoning ordinance. As a result of these complaints, several stop work orders were issued. Each time, however, construction eventually resumed. Petitioners appeared at two meetings of respondent's board of trustees, on September 7, 2004, and September 21, 2004. When construction continued on the garage, despite the concerns petitioners and other neighborhood residents voiced at these meetings, petitioners filed an appeal with the BZA. They alleged that respondent was not enforcing provisions of the zoning ordinance pertaining to side setback requirements, compatibility and similar building materials requirements, site plan approval, and adherence to the building permit. The BZA ultimately denied petitioners' appeal and allowed construction to continue. Petitioners then appealed to the circuit court. Respondent subsequently filed a motion for summary judgment, alleging that petitioners lacked standing, which the circuit court denied. After hearing the parties' appellate arguments, the circuit court issued an order reversing the BZA's decision to allow construction to proceed and remanding to the BZA for entry of a

decision consistent with its opinion, which provided that the garage would have to be razed and reconstructed unless the appropriate variances were applied for and granted.

Respondent's first argument on appeal is that the circuit court erred by failing to join the owners of the garage as necessary parties. We disagree.

A trial court's rulings on joinder are reviewed for an abuse of discretion. *PT Today, Inc v Comm'r of Office of Financial & Ins Services*, 270 Mich App 110, 135; 715 NW2d 398 (2006). "An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (internal quotations and citations omitted). "[W]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* Appellate courts are not constitutionally authorized to reach nonjusticiable controversies. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 294-295; 715 NW2d 846 (2006). To invoke judicial power, there must be a real dispute, the avoidance of deciding hypothetical questions, and a party who has suffered real harm. *Id.* at 292. Where a proper form of relief is available to a party, we do not unnecessarily decide constitutional issues. *Id.*

In the present case, respondent alleges that the homeowners who constructed the garage must be joined as a party to the litigation because the demolition of their garage would deprive them of due process of law. However, review of the circuit court's decision reveals that it merely reversed the holding of the BZA and remanded for additional proceedings, including consideration of whether appropriate variances would be applied for and granted. Thus, at this stage of the proceeding, due process concerns are not yet implicated. *Federated Ins, supra*. Although the circuit court mentioned the possibility that the garage might be razed, there is no indication that it would occur prior to the resolution of the remand and the application for variances. Accordingly, the circuit court, in overseeing the zoning appeal, did not abuse its discretion in denying the request for joinder. *PT, supra*.

Respondent's second argument on appeal is that the circuit court erred in reversing the decision of the BZA with respect to the side setback, height, and roof pitch requirements set forth in the ordinance. We disagree.

"This Court reviews de novo a trial court's decision in an appeal from a city's zoning board, while giving great deference to the trial court and zoning board's findings." *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). "The decision of a zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). When performing judicial review, the competent, material, and substantial evidence on the record standard requires a knowledge of the facts justifying the board's conclusion. *Id.* The zoning board may not reach conclusions without specifying the factual findings underlying the determination of the zoning ordinance. *Id.* at 378-379.

In the present case, we cannot conclude that the circuit court erred in holding that the decision of the BZA was not supported by competent, material, and substantial evidence on the

record with regard to the challenged dimensions. Moreover, the circuit court noted that the BZA was not entitled to deference when the interpretation was contrary to a logical reading of the language of the ordinance. Further, we note that the decision of the BZA did not contain any indication of the basis for the decision or an application of factual findings to the language of the ordinances at issue contrary to *Reenders, supra*. Rather, the BZA concluded that the building permit was properly issued and that the permit holder was responsible for seeking “any variances needed.” Thus, the BZA did not even advise the permit holder regarding the ordinance provision that would require a variance. Accordingly, respondent’s challenge is without merit.

Lastly, respondent alleges that the circuit court erred in holding that respondent waived its standing argument by failing to raise it before the BZA. We disagree.

Challenges to standing are waived if not timely raised. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass’n*, 264 Mich App 523, 528; 695 NW2d 508 (2004); MCR 2.116(C)(5); MCR 2.116(D)(2). “Whether a party has standing is a question of law,” which we review de novo. *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Under MCL 125.293a(1),¹ “a person having an interest affected by the zoning ordinance may appeal” a decision of the board of appeals to the circuit court. In the present case, respondent did not challenge standing until it filed a motion for summary disposition in the circuit court. *Glen Lake, supra*. Moreover, petitioners have an interest affected by the zoning ordinance. See Const 1963, art 6, § 28; *D’Agostini v City of Roseville*, 396 Mich 185, 186; 240 NW2d 252 (1976); *Kalinoff v Columbus Twp*, 214 Mich App 7, 9 n 1; 542 NW2d 276 (1995); *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688; 311 NW2d 828 (1981).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

¹ The township zoning act, MCL 125.271 through 125.310, was repealed by MCL 125.3702, effective July 1, 2006. However MCL 125.3702(2) provides, “This section shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, permit, or decision that was based on the acts repealed by this section.”